

Question No: 019
Topic: Industry Super Australia – early release super calculator
Committee Member: Senator Paterson
Reference: Hansard page 30

Question

CHAIR: I will move onto another matter also relating to questions on notice. Industry Super Australia published a misleading calculator on the cost of withdrawing early super, and in response to questions on notice I asked about this ASIC reply that it was reviewing the ISA's changes and will consider its next steps. What next steps did ASIC take regarding ISA's calculator?

Mr Shipton: I'm going to ask Commissioner Press to supplement, but we did get further and better particulars from ISA. We look at this through the prism of misleading and deceptive conduct. That's a very high bar to reach as a matter of enforcement, and our conclusion was that there was a very low chance that this would meet the bar required by the courts and that it's not possible for us to take this matter further. I'll ask Commissioner Press to supplement if there's anything else to add.

Ms Press: I'm not sure that there's much else to add to that, other than to say that the discussions that we had with ISA led them to update their assumptions and ensure that there was consistency across their calculators and projections, which we think is a good thing.

Mr FALINSKI: Sorry to interrupt. By 'update' you mean 'correct'—is that right?

Ms Press: No, they changed their assumptions to bring them in line and be consistent. They are assumptions, so they're not necessarily incorrect or correct. They are assumptions. They are now consistent.

Mr FALINSKI: So even now ASIC is refusing to determine whether they are correct or incorrect assumptions?

Ms Press: By definition, it is an assumption. An assumption of a market rate of return can vary dramatically, and I don't think there is a position for ASIC to say whether an assumption on a return is correct or incorrect.

CHAIR: Are there criminal penalties for misleading and deceptive conduct?

Mr Shipton: Let's ask Mr Crennan as to the extent of criminality for misleading and deceptive conduct.

Mr Crennan: Misleading and deceptive conduct, under the Corporations Act, is not a criminal penalty provision. However, the ASIC Act has a number of different formulations of conduct, such as 'false or misleading representations', which is 12DB of the ASIC Act. That can be an offence—in other words, criminal conduct—and, in fact, that is a strict liability provision. I won't go into too much detail on section 12DB, but it sets out a number of types of representations—for example, making a testimonial by a person relating to a service and all those sorts of matters of warranty conditions and so forth. So if the conduct were to fall within one of those subsections then there's a possibility at least that it would be treated as criminal conduct by ASIC.

CHAIR: Are there jail terms as possible consequences for those breaches?

Mr Crennan: Yes.

CHAIR: At any point, did ASIC inform ISA that there were possible jail terms for potentially misleading and deceptive conduct?

Mr Crennan: Not as far as I'm aware. Perhaps I'm not the right person to answer this question. I was simply answering as to whether—

CHAIR: Indeed. It was more directed to Mr Shipton or Ms Press.

Ms Press: I don't believe that those words were directly said to ISA, no.

CHAIR: Anything to add, Mr Shipton?

Mr Shipton: No. I will just say that [inaudible] a licensed—

CHAIR: Sorry, your audio is really fading again, Mr Shipton. We're struggling to hear you.

Ms Press: I will try one more time. I will just say that, when we were dealing with ISA, we were dealing with a sophisticated licensed entity who was or should be cognisant of their obligations under the law and cognisant of the boundaries in which they operate. So we are dealing with a very sophisticated organisation when we're dealing with ISA.

CHAIR: Indeed, and you would expect from that that they would have much better conduct and there would be much less need for ASIC to ask them to make corrections like this.

Mr Shipton: All I can say is that we are pleased that we have been able to clarify this matter and we are pleased with the result of that updating of the assumptions by ISA.

CHAIR: So is it the case that when you have unsophisticated market participants, like real estate agents, it's appropriate to threaten them with jail but when you have sophisticated market participants, like Industry Super Australia, it's more appropriate to privately negotiate with them without making any threats?

Mr Shipton: Just as a clarification, I, personally, wouldn't classify it as a threat. We deliberately made it known, the ramifications of breaking the law, to a class or sector that may not be aware of the consequences of doing so. Your points about, with review, how communications can be improved, as my colleague said, were well taken and we will certainly take that onboard. Things move fast in these types of situations and this situation. But I don't think we can compare this in an apples-to-apples scenario. We did have forthright and robust conversations with ISA, and we certainly made it very plain to the real estate sector and other sectors. Yes, certainly, improvements can be made, with hindsight, as to our levels and types of communication, but I'm wary to draw too much of a comparison between these two matters.

CHAIR: Would it concern you if the misleading estimates from the ISA's original calculator—which have since been corrected—were still being used in public discussion about the scheme?

Mr Shipton: It's difficult for us to have a hypothetical.

CHAIR: Let me make it not a hypothetical for you, then. I'll ask the secretariat to provide you this via email, and I'll accept an answer on notice rather than on the spot. In a media release issued today by the ACTU the assistant secretary, Scott Connolly, quoted those misleading figures—that ISA has since withdrawn, many weeks ago—and is continuing to use those, I would say, to discourage people from taking up this choice available to them if they wish.

Mr Shipton: Thank you for bringing that to our attention. We will certainly have a look at it and get back to you on notice.

Answer

The Secretariat provided ASIC with a copy of a media release issued by the ACTU on 15 July 2020, 'Super withdrawals scheme ensures retirement poverty will be Morrison's legacy' (ACTU Press Release). The Chair has queried the use of figures contained in the ACTU Press Release about the financial impact of early release of superannuation.

The figures quoted in the ACTU Press Release are current, revised figures taken from Industry Superannuation Australia (ISA), not the original estimates.

As noted to the Committee, ISA made changes to their original estimates following ASIC raising concerns that the ISA modelling did not follow all of the principles that ASIC articulated in a frequently asked question published on ASIC's website on 16 April 2020: *How should trustees communicate the potential long-term impacts of the COVID-19 early release of superannuation scheme on retirement balances?* Contrary to the ASIC principles, the ISA modelling did not use the same assumptions as the generic calculator on the ISA website.

ASIC asked ISA to communicate the changes to their member funds, some of whom were quoting the ISA figures, and to revise an early media release that was still quoting the original ISA figures at the time (in May 2020). In a letter to ASIC of 26 May 2020, ISA confirmed that they had "been in contact with any parties, including associated funds, that may have sourced figures from ISA."

ISA's revised figures were included in the ACTU Press Release: a 25-30 year old who withdraws \$20,000 over the next two years will be between \$79,000 and \$95,000 worse off by retirement.